

Public Prosecutor v Muhamad Arif bin Sabri & Ors

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
D-05-11-01 OF 2012
ABDUL WAHAB PATAIL, MOHTARUDIN BAKI AND TENGKU
MAIMUN JJCA
21 MARCH 2014

Criminal Procedure — Sentencing — Inadequacy of sentence — Whether manifestly inadequate — Whether trial court took all relevant factors into account before passing sentence — Whether trial court did not commit any error of law, principle, fact or appreciation of facts in convicting or passing sentence to warrant appellate intervention

The first, second and third respondents were originally jointly charged, inter alia, with committing murder whilst the fourth and fifth respondents were charged with abetting them in the act. At the end of the prosecution's case, the High Court held the prosecution's evidence only sufficed to prove a prima facie case of culpable homicide not amounting to murder and accordingly amended the murder charges to the lesser offence. The respondents pleaded guilty to the amended charge and were convicted and sentenced to 15 years' jail each. In the instant appeal, the appellant contended that the trial court should have called for the defence to the murder charges; alternatively, that the sentence of 15 years was inadequate as public interest, the seriousness of the offence and the fact that the respondents did not have a good reason to do what they did were factors which were not considered before sentencing. The trial court felt the 15 year jail term was reasonable as it was half the maximum allowed under the law and also for the reason the respondents had pleaded guilty and were first offenders and that the death of the victim was unplanned.

Held, dismissing the appeals:

- (1) The appellant failed to show that the sentence imposed on the respondents was manifestly inadequate. Public interest was not solely founded upon passing of heavy sentences. The sentence must be measured against the particular facts and circumstances of the offence upon which the offenders were convicted along with mitigating factors. The High Court had considered all these before passing sentence (see para 21).
- (2) With regard to the conviction, the court found that the trial court had not committed any error of law, principle, fact or appreciation of facts causing such injustice as to require appellate intervention (see para 17).

A [Bahasa Malaysia summary]

- Responden-responden pertama, kedua dan ketiga adalah pada asalnya dituduh, antara lain, melakukan pembunuhan sementara responden-responden keempat dan kelima dituduh bersubahat dengan mereka dalam tindakan tersebut. Pada akhir kes pihak pendakwaan, Mahkamah Tinggi memutuskan keterangan pihak pendakwaan hanya mencukupi untuk membuktikan kes prima facie homisid salah yang tidak menjumlahkan kepada pembunuhan dan dengan itu meminda tuduhan membunuh kepada kesalahan yang lebih ringan. Responden-responden memplid bersalah kepada tuduhan yang dipinda dan disabitkan dan dihukum penjara 15 tahun setiap seorang. Dalam rayuan ini, perayu berhujah bahawa mahkamah perbicaraan patut memanggil untuk pembelaan kepada tuduhan membunuh; secara alternatif, bahawa hukuman 15 tahun adalah tidak memadai kerana kepentingan awam, keseriusan kesalahan dan fakta bahawa responden-responden tidak mempunyai alasan yang baik untuk berbuat apa yang dilakukan mereka adalah faktor yang tidak dipertimbangkan sebelum menjatuhkan hukuman. Mahkamah perbicaraan berpendapat 15 tahun hukuman penjara adalah munasabah kerana ia adalah sebahagian daripada tempoh maksimum yang dibenarkan di bawah undang-undang dan juga untuk alasan responden-responden telah memplid bersalah dan adalah pesalah-pesalah pertama dan bahawa kematian mangsa adalah tidak dirancang.

Diputuskan, menolak rayuan-rayuan:

- (1) Perayu gagal untuk menunjukkan bahawa hukuman yang dikenakan ke atas responden-responden adalah jelas tidak memadai. Kepentingan awam tidak semata-mata diasaskan ke atas menjatuhkan hukuman berat. Hukuman mesti diukur terhadap fakta dan keadaan tertentu kesalahan atas mana pesalah-pesalah disabitkan bersama faktor peringanan. Mahkamah Tinggi telah mempertimbangkan kesemua ini sebelum menjatuhkan hukuman tersebut (lihat perenggan 21).
- (2) Berkaitan sabitan, mahkamah mendapati bahawa mahkamah perbicaraan tidak melakukan apa-apa kesilapan undang-undang, prinsip, fakta atau penilaian fakta menyebabkan ketidakadilan untuk mengkehendaki campur tangan mahkamah rayuan (lihat perenggan 17).

Notes

- For cases on inadequacy of sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4446–4486.

Cases referred to

Chandmal & Anor v State of Rajasthan AIR 1970 SC 917 (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15, FC (refd)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd) **A**
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465, SC (refd)

Legislation referred to

Penal Code ss 34, 109 299, 300, 302, 304(a), 364 **B**

Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Ameenuddin Ibrahim (Ameen Harbhajan & Co) for the second respondent. **C**

Mohd Ilias Mohd Nor (Mohd Ilias & Co) for the third respondent.

Dorairaj (P Dorairaj & Co) for the fourth respondent.

Naran Singh (Naran Singh & Co) for the fifth respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The first to third respondents had been charged under s 302 of the Penal Code read with s 34, as well as s 364 read with s 34. The fourth and fifth respondents were charged under two charges under s 109 read with ss 302 and 364 respectively. **D**

[2] At the end of the prosecution case, the High Court amended the s 302 charges to a charge under s 304(a) of the Penal Code. The respondents pleaded guilty to the amended charge and were convicted and sentenced to 15 years imprisonment each from the date of arrest. They were acquitted and discharged in respect of the charge under s 364 of the Penal Code. **E**

[3] The public prosecutor appealed. At the hearing before this court, only one issue was pursued. It was submitted that the defence should have been called under s 302, and a reduction to s 304(a) applies where there is no intention. **F**

[4] The learned deputy public prosecutor relied on *Virsa Singh v State of Punjab* AIR 1958 465 (SC) for the proposition in respect of the elements under s 300 of the Penal Code that: **G**

... It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. ... **H**

I

A [5] In Malaysia, *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC), has long been the clearest exposition as to ss 299 and 300 and the distinctions between the sections. The accused had been convicted by the High Court under s 302. The deceased was attacked by the appellants and probably one other armed with choppers and saw, at the time and place alleged by the prosecution. After the attack began, he ran up to the first floor, but was pursued by three assailants, one carrying a saw and the other two, choppers. He died the same day as a result of the multiple injuries he received. The pathologist testified that in his opinion the probable cause of death was multiple injuries leading to shock and haemorrhage.

C [6] What is relevant in *Tham Kai Yau & Ors v Public Prosecutor* is, as in the appeal before us, the question as to the offence of which the accuseds should have been convicted. The ground of appeal raised in that case was:

D ... that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted.

[7] Raja Azlan Shah FJ (as His Majesty then was) continued:

E ... In amplification of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of mens rea in the minds of the appellants. It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow. In actual practice however it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. ... Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

H [8] His Majesty explained that s 299 clearly defined the offence of culpable homicide, that it may not amount to murder: (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code.

I [9] His Majesty concluded as follows:

... In view of what we have stated above, a case such as the present must therefore fall within the second part of s 299 or the third clause of s 300. Speaking generally, if the

act must in all probability cause death, the offence is within s 300 of the Penal Code, and if the act is only likely to cause death, the offence falls within s 299 of the Penal Code. None of the exceptions to s 300 of the Penal Code were established. In ordinary circumstances we should probably have had little difficulty in upholding the convictions of the appellants for murder but in view of the nature of the medical evidence which we have touched on earlier, we felt the case might not unreasonably be brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of s 304 of the Penal Code. ...

A

B

[10] The submissions of the learned deputy public prosecutor did not demonstrate any error in the summation of the facts of the case and the evidence by the trial judge. It concluded, at p 24 of the written submissions, that:

C

Apabila dilihat secara keseluruhan keterangan-keterangan yang ada, ianya cukup kuat untuk membuktikan semua Responden yang membawa kepada kematian simati.

D

[11] The submissions missed the very point driven home in *Tham Kai Yau & Ors v Public Prosecutor* that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. We add that the fact death was caused alone does not necessarily mean it is culpable homicide. It is culpable homicide only if it falls under one of the limbs of s 299.

E

[12] The High Court observed that the trial began on 13 June 2010, and a key witness, one Azmizi bin Abdul Rahim ('SP27') was arrested in relation to this case only on 28 January 2011 after 26 witnesses had been called. It further observed:

F

(15) Mengikut keterangan SP27, selepas kejadian beliau telah ke Thailand atas alasan memperolehi hadiah lawatan dari syarikat beliau bertugas. Selepas balik dari Thailand beliau berada di rumah mertuanya di Kg Kemasin Bachok, dan pada waktu malam beliau bertugas di tempat karaoke di Bachok yang dikendalikan oleh bapa mertuanya. Pengunjung di pusat karaoke tanpa lesen itu mengikut SP27 terdiri daripada polis-polis di Daerah Bachok.

G

(16) Oleh itu dari pengamatan saya si mati boleh dibawa ke Pantai Kemasin tempat pembunuhan pada malam itu berkemungkinan atas pandu arah dari SP27, ini adalah kerana hanya SP27 sahaja yang tinggal di kawasan tersebut.

H

[13] There was also another person 'Mohd Rozi' and the High Court observed:

I

20. ... Pihak pendakwaan juga di dalam kegelapan akan siapakah yang masih bebas itu sehingga SP27 muncul dan memberi keterangan. Sebab itulah mahkamah ini semasa mengemukakan pertuduhan pindaan (P1C dan P2C) telah memasukkan

A nama 'Mohd Rozi' supaya tertuduh mengetahui siapa yang dimaksudkan dengan seorang yang masih bebas itu.

B [14] The High Court dealt extensively with the prosecution evidence, obtained guidance from *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734, *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15(05–172 of 2011(W)) and *Tham Kai Yau & Ors v Public Prosecutor* before holding:

C (73) Selain dari peranan T1 tertuduh-tertuduh yang lain sukar dibuktikan peranan mereka dan niat mereka secara langsung untuk membunuh si mati. Pihak pendakwaan bergantung kepada keterangan mengikut keadaan yang tidak begitu kuat akan siapa sebenarnya yang menyebabkan kematian semasa si mati diheret ke tepi laut kerana keadaan adalah gelap.

D [15] The High Court referred to other cases on circumstantial evidence, including *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917, where it was held:

E It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt.

F

[16] Then only the High Court concluded:

G (79) Oleh itu selepas mahkamah ini membuat penelitian secara maksima dengan meneliti kesemua pertuduhan keatas kelima-lima tertuduh yang dibicarakan secara bersama di dalam empat pertuduhan berasingan. Mahkamah mendapati peranan yang dimainkan oleh kesemua tertuduh boleh dikatakan secara serata dan hanya T1 dan SP27 agak banyak memainkan peranan yang mana tidak boleh dikatakan pihak pendakwaan berjaya mewujudkan suatu kes secara prima facie atas empat pertuduhan tersebut.

H

(80) Walaupun wujud niat bersama secara tiba-tiba semasa membawa lari si mati di rumahnya di Pengkalan Chepa, namun ianya hanya bertujuan asalnya hanya untuk memberi amaran dan pengajaran namun apabila si mati dibawa ke tepi Pantai Teluk Kemayan, telah berlaku perbuatan di luar perancangan.

I

(81) Walau apa sekalipun pembunuhan tersebut memerlukan lebih dari seorang melakukannya dan tetapi mungkin seorang yang masih bebas bernama 'Mohd Rozi' yang menyembeleh si mati kerana kecederaan kelar di tekak si mati yang membawa maut. Manakala luka di bahagian telinga tidak semetinya membawa maut (*Cheng Kam Kuen v Public Prosecutor*).

(82) Oleh itu mahkamah ini berpendapat pindaan pertuduhan oleh mahkamah seperti di P1C dan P2C satu tuduhan di bawah s 304(a) KK adalah tepat dan selamat setakat mana bukti oleh pihak pendakwaan yang mana hanya setakat itu pihak pendakwaan berjaya membuktikan suatu kes prima facie.

A

[17] We find no error of law, principle, fact or appreciation of facts causing such injustice as to require appellate intervention.

B

[18] The public prosecutor had also appealed against the sentence of 15 years.

C

[19] The High Court has stated in the grounds of judgment that:

(83) Tertuduh-tertuduh kesemuanya memilih untuk mengaku salah maka hukuman yang dijatuhkan iaitu 15 tahun penjara adalah memadai memandangkan kesemua mereka tidak mempunyai rekod lampau dan kejadian pembunuhan tersebut tidak dirancang dan dilakukan oleh kerana terpengaruh dengan satu sama lain. Jika dibandingkan dengan hukuman maksima 30 tahun, 15 tahun adalah juga separuh dari tempoh yang maksima.

D

[20] Sentencing is the discretion of the trial court. It is trite that an appellate court will intervene only if it was shown that the sentence is, in this case, manifestly inadequate. It was submitted:

E

(i) Prinsip kepentingan awam tidak langsung dicerminkan dalam Penghakiman HMT dalam menjatuhkan hukuman tersebut.

F

(ii) Walaupun semua Responden mengaku salah, namun keseriusan kesalahan yang telah dilakukan tidak dicerminkan dalam hukuman yang dijatuhkan oleh HMT.

(iii) Responden-responden tiada alasan kukuh untuk melakukan kesalahan tersebut. Setakat untuk menyatakan semua responden terpengaruh antara satu sama lain (seperti yang dinyatakan oleh HMT) bukan lah satu mitigasi sebenar.

G

[21] In our view, the public interest is not solely founded upon passing heavy sentences. The sentence must be measured against the particular facts and circumstances of the offence upon which the offenders were convicted along with mitigating factors. The High Court did consider these. We find no merit in the submissions as to enhancement of sentence. It failed to demonstrate that the sentence was manifestly inadequate.

H

[22] For the foregoing reasons, we dismissed the appeals.

I

Appeals dismissed.

Reported by Ashok Kumar